



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10

1200 Sixth Avenue, Suite 155  
Seattle, WA 98101-3188

WATER  
DIVISION

DEC 10 2019

The Honorable Mike Dunleavy  
Governor  
The State of Alaska  
P.O. Box 110001  
Juneau, Alaska 99811

Dear Governor Dunleavy:

Thank you for your November 22, 2019, letter regarding the comments the U.S. Environmental Protection Agency submitted on October 29, 2019, in response to the U.S. Army Corps of Engineers Public Notice, reference number POA-2013-00396, regarding Ambler Mining District Industrial Access Project (Ambler Road) as proposed by the Alaska Industrial Development and Export Authority.

The EPA supports the economic development of Alaska resources and recognizes the protections afforded by Alaska state laws and regulations. The EPA also recognizes that the Alaska National Interest Lands Conservation Act provides for access through federally-managed areas to the Ambler Mining District. I have asked my staff to work collaboratively with the Corps to resolve our concerns outside of the 404(q) process. The October 29, 2019 letter from the EPA provides information regarding agency concerns with the project and will remain in the Corps record for their consideration. Please also see the enclosure for clarification on a few of the concerns you raised in your letter.

We look forward to continued coordination with the Corps and the state of Alaska related to the environmental review and permitting for the Ambler Road project.

Sincerely,

A handwritten signature in blue ink, appearing to read "Daniel D. Opalski".

Daniel D. Opalski  
Director

Enclosure

Enclosure

**EPA Region 10 Comments in Response to Governor Dunleavy's November 22, 2019 Letter**

Your letter raised several concerns regarding the EPA's involvement in the Ambler Road project and our October 29, 2019 comment letter that we would like to address. Your letter focuses on the EPA's use of a 1992 *Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army* - developed pursuant to Section 404(q) of the Clean Water Act - in reference to the Ambler Road project. In response, we would first like to clarify the EPA's role in Section 404 of the Clean Water Act, the intent of referencing the MOA in the 404 permitting process, and what it means to identify an area as an "aquatic resource of national importance."

First, the EPA plays an important role supporting the development of robust Clean Water Act Section 404 permit decisions. In doing so, the EPA is not only responsible for developing and interpreting environmental criteria used in evaluating CWA 404 permit applications, but pursuant to its authority under Section 404(b)(1) of the CWA, the EPA may also provide comments to the Corps regarding compliance with the Section 404(b)(1) Guidelines. The EPA strives to cooperatively support the U.S. Army Corps of Engineers by providing constructive and effective review of proposed permits, focusing on providing recommendations and suggestions on matters such as the Least Environmentally Damaging and Practicable Alternative. As your letter states, the EPA's interaction with the Corps during 404 permit reviews is guided by the 1992 MOA referenced above.

The 1992 MOA was developed pursuant to Section 404(q) of the Clean Water Act, which required the Secretary of the Army to enter into interagency agreements with the EPA, Department of Commerce, and the Department of the Interior to assure that delays in the issuance of permits under Section 404 are minimized. In August 1992, Army and EPA entered into such an agreement. This MOA outlines a process and time frames for coordinating and resolving differences among the agencies associated with the review of CWA 404 permit applications. The MOA applies to permits issued under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research and Sanctuaries Act.

However, there is a common misunderstanding that the initial EPA coordination/comment letters associated with the Section 404(q) MOA (i.e. 3(a) letters) are elevation letters. The initial letters sent under this MOA are a means of coordination and communication between the Corps District and the EPA Region and do not elevate the matter for higher level review. The objective of these coordination letters is to provide a means to resolve concerns about a project's compliance with Section 404 of the CWA and accompanying regulations. These comment letters are a means by which the EPA can assist the Corps District in making timely and robust 404 permit decisions.

Another point needing clarification pertains to the term "aquatic resource of national importance." In order to resolve outstanding concerns, the MOA requires the EPA to first determine that issuance of the permit will result in substantial and unacceptable adverse impacts to an ARNI. The term ARNI is not defined in the section 404(q) MOA, but projects that do not meet this threshold are not subject to the 404(q) process. Requiring the EPA to identify the area as an ARNI ensures that a formal discussion process for a proposed project would not be initiated where resources to be impacted are insignificant or the impacts trivial. It is also important to understand that the EPA's ARNI determination is not a special use designation, does not preclude a favorable permit decision, does not expand an applicant's compensatory mitigation obligations, and does not predetermine the permit outcome of any future projects. In our more recent letters provided under the 404(q) process, we have included language

clarifying the purpose of the ARNI designation and will continue to look for ways to make that point clearer.

With regard to the EPA's participation, we have been consistent in expressing our project-related concerns, including those related to piecemealing project components, during all phases of the Ambler Road project development – both prior to and following our formal engagement as a cooperating agency. There were seven months between August 25, 2017 and April 3, 2018 when the EPA was unable to commit staff resources at a level to support involvement as a cooperating agency. Nevertheless, during that time the EPA offered to remain involved and informed, including by participating in phone calls and meetings, helping identify potential issues warranting further analysis, helping design project alternatives, and reviewing preliminary documents as requested. Moreover, the EPA accepted the invitation to serve as a cooperating agency on April 3, 2018. Since that time, we have continued our engagement at BLM, Corps, and applicant-driven meetings, and have continued to raise concerns about this and other issues throughout the process.

For example, the EPA participated in the Compensatory Mitigation Agency Meeting led by AIDEA on November 1, 2019 to solicit specific mitigation suggestions within HUCs 190503 (Kobuk-Selawik Rivers) and 190406 (Koyukuk River). At this meeting, the EPA, National Park Service, Alaska Department of Natural Resources, and U.S. Fish and Wildlife Service identified several publicly available databases containing mitigation opportunities, including historic mining sites and contaminated sites. We are committed to providing information in a timely and cooperative manner that will assist AIDEA and the Corps in identifying opportunities for compensatory mitigation. Numerous such opportunities exist, but most require due-diligence on the part of the applicant to determine feasibility.

Your letter also references the June 15, 2018 *Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency Concerning Mitigation Sequence for Wetlands in Alaska under Section 404 of the Clean Water Act*. The EPA agrees that this MOA offers useful, Alaska-specific guidance on options for ensuring that Clean Water Act requirements for compensatory mitigation are appropriately evaluated and applied. In particular, the MOA provides flexibility in identifying compensatory mitigation options to afford applicants a broader suite of options for ensuring that a proposed activity complies with the Section 404(b)(1) Guidelines, which specifically require that “the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions.”<sup>1</sup> The MOA does not diminish this regulatory requirement to provide compensatory mitigation, and we encourage AIDEA to continue referring to the 2018 Mitigation MOA for guidance in identifying opportunities to offset aquatic resource impacts, particularly in the use of the watershed approach. We appreciate AIDEA's coordination on the proposed project to date and look forward to working together to identify practicable compensatory mitigation opportunities to ensure compliance with the CWA.

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<sup>1</sup> 40 C.F.R. § 230.93(f)(1).